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In the Supreme Court of the United States

No. 677

FLOYD JOHNSON,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO OBTAIN REVIEW OF A FINAL JUDGMENT FROM THE SUPREME COURT OF THE STATE OF IDAHO, A COURT OF LAST RESORT IN THE STATE OF IDAHO

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In the Supreme Court of the United States

FLOYD JOHNSON,
Petitioner,

vs.

STATE OF IDAHO,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

COMES NOW, the above named petitioner, FLOYD JOHNSON, by and through his attorneys, and files this petition for writ of certiorari for the purposes of obtaining a review by this Honorable Supreme Court of that certain judgment of the Supreme Court of the State of Idaho, being the court of last resort in the State of Idaho in a criminal case wherein the judgment of conviction of this petitioner upon a charge of felony was affirmed, and in accordance with Rule 23, revised rules petitioner sets forth the following:

A. The decision of the case sought to be reviewed

is entitled, "State of Idaho, Plaintiff, vs. Floyd Johnson, Defendant", reported at Volume 287 Pac. 2nd, page 425. The above decision is a decision of the Supreme Court of the State of Idaho, which court is the court of last resort in the State of Idaho. The decision in said case has not yet been reported in the official Idaho Reports, but a copy of such original opinion dated June 29, 1955, is attached hereto in the Appendix at page 35. The opinion of the court denying the petition for rehearing is cited at Volume 287 Pac. 2nd, page 432. The opinion denying the petition for rehearing is not yet published in the official Idaho Reports, but a copy thereof dated September 16, 1955, is attached hereto in the Appendix at page 55.

B. A concise statement of the grounds on which the jurisdiction of this court is invoked is as follows:

(1 & 2) The original opinion in the action entitled, "State of Idaho, Plaintiff, vs. Floyd Johnson, Defendant" was filed on June 29, 1955. This was a unanimous decision, affirming the conviction of the petitioner. On July 19, 1955, being within the twenty (20) days allowed under Idaho rules of practice for filing a petition for rehearing, petitioner filed his petition for rehearing, which singled out to the Supreme Court for its reconsideration the single federal question involved in this petition for writ of certiorari. On September 16, 1955, the Supreme Court of the State of Idaho, being the court of last resort, filed its opinion denying the petition for rehearing. Upon this petition for rehearing the decision was a split decision, resulting in four (4) justices joining the majority for affirming

the conviction, and one justice dissenting upon the federal question involved. On September 16, 1955, the court made and entered its judgment by the terms of which the prior judgment of conviction, entered in the District Court of the Ninth Judicial District of the State of Idaho, in and for the County of Teton, was affirmed, a copy of which is attached hereto in the Appendix at page 73. On December 14, 1955, petitioner lodged with the Clerk of the Supreme Court of the United States a form of petition for writ of certiorari and a notice of filing petition for writ of certiorari. This petition being not in proper order, an order extending time to file petition for writ of certiorari was granted, dated the 14th day of December, 1955, allowing petitioner through the 11th day of February, 1956, within which time to file such petition for writ of certiorari. A copy of the order is attached in the Appendix at page 74.

(3) As will hereinafter appear from the statement of facts and questions presented it will appear that at the trial in the District Court the petitioner called as a witness one Donald Lee Fedder. This particular witness had been previously interrogated by James W. Blaine, Esquire, the attorney for petitioner, and at the time of the questioning by Mr. Blaine, the witness Fedder admitted to Mr. Blaine that he, the witness, had entered the Tetonia Club in Tetonia, Idaho, and had removed several slot machines therefrom. He claimed that the entry was not a burglary for the reason that he had purchased the machines from one of the partners. At the time of the taking of this state-

ment the witness Fedder emphatically stated that this petitioner was not with him at the time that he (Fedder) had entered the Tetonia Club. In any event, the witness Fedder was charged with having committed a burglary of the Tetonia Club and the petitioner herein was also charged by separate information. The two defendants had separate trials. At the time of petitioner's trial, the witness Fedder was called by the petitioner as a witness, it being the obvious intention of the petitioner to elicit from the witness Fedder the exculpating testimony which he had previously given to Mr. James W. Blaine. The witness, however, refused to testify under the Fifth Amendment to the Constitution of the United States upon the ground that his testimony might criminate him (the witness). As will more fully appear from the statement of facts, no conceivable answer which could have been given by the witness Fedder could possibly have criminated him. The trial court, however, inquired of the witness as to whether or not his own appeal was still pending, and ascertaining that it was, the court concluded that the witness didn't have to answer any questions. Under the Constitution and statutes of the State of Idaho a defendant in a criminal case, as this petitioner was, is entitled to compel the attendance of witnesses to testify on his behalf, and such right to compel the attendance of witnesses is a right to due process of law. The Fourteenth Amendment of the Constitution of the United States specifically declares that no state shall deprive any person of his life, liberty, or property without due process of law. The Fifth Amendment to

the Constitution of the United States extends to all citizens the privilege of declining to testify if their testimony would criminate the witness. Here, then, we have a petitioner who is entitled to a trial according to the principles of due process of law, but we also have a witness who refused to testify and thereby give this petitioner the benefit of his testimony and due process of law upon the claim that under the circumstances he was entitled to the privilege of refusing to testify under the Fifth Amendment. We earnestly urge that under the circumstances, no question which was asked the witness, Fedder, could have conceivably criminated him, and when the trial court ruled that the witness did not have to testify, and when the Supreme Court of the State of Idaho, being the court of last resort in the State of Idaho, affirmed the ruling of the trial court on this ruling, the petitioner respectfully urges that the state court of Idaho decided a federal question in a way which is not in accord with the applicable decisions of the Supreme Court of the United States, and that the federal question so decided was one of substance for the reason that in granting the privilege to the witness Fedder to refuse to testify, such ruling did deny to this petitioner indispensable and material evidence in support of his theory of innocence, and therefore this petitioner contends that the State of Idaho has convicted him without according to him the right of due process of law, and by a sentence of confinement in the penitentiary, the State of Idaho has denied him his liberty without due process of law (See Rule 19, Section 1(a), Part 5, Revised Rules of the

Supreme Court of the United States, effective July 1, 1954).

C. The questions presented for review in this case are these:

(1) Was the defense witness, Donald Lee Fedder, privileged under the Fifth Amendment to the Constitution of the United States of America to refuse to testify concerning any matter at the trial of the petitioner simply because he (the witness) happened to occupy the position of being a person charged with the same crime in some other separate proceedings?

(2) Was the witness, Donald Lee Fedder, entitled to claim the privilege of refusing to testify under the Fifth Amendment of the Constitution of the United States of America upon the ground that his answers might criminate him, when no conceivable direct answer to the question asked could conceivably criminate the witness or furnish proof to link him with some crime?

(3) Does not the fulfillment of due process of law under the Fourteenth Amendment of the Constitution of the United States of America require not merely the compulsory attendance of witnesses, but that such witnesses when placed upon the witness stand shall testify to all material facts not otherwise privileged?

(4) Is the State of Idaho to be permitted to deny this petitioner of his liberty by according to him the right to place a witness upon the stand, but to frustrate that right and to deprive the petitioner of his right to due process of law by permitting the witness to refuse to testify under the Fifth Amendment of the

Constitution of the United States of America upon the ground that his answer might criminate him (the witness) when no conceivable direct answer to any question propounded to the witness could conceivably have crimiated him?

(5) Did the courts of the State of Idaho accord this petitioner, FLOYD JOHNSON, the right to a trial by due process of law when the trial court and the Supreme Court of the State of Idaho permitted the witness, Donald Lee Fedder, the privilege of refusing to testify under the Fifth Amendment of the Constitution of the United States on the ground that his testimony might criminate him and thereby deprive this petitioner as a defendant of material evidence in support of his defense when under the circumstances no conceivable direct answer to any question asked the witness could have conceivably criminated him?

(6) Has the State of Idaho convicted the petitioner, FLOYD JOHNSON, and thereby deprived him of his liberty without due process of law?

D. The constitutional provisions and statutes which the case involves are, as follows:

AMENDMENT 5 CONSTITUTION
OF THE UNITED STATES

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation."

AMENDMENT 6 CONSTITUTION OF THE UNITED STATES

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; *to have compulsory process for obtaining witnesses in his favor,* and to have the assistance of counsel for his defense."

AMENDMENT 14 CONSTITUTION OF THE UNITED STATES (Sec. 1)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life,*

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE 1, SECTION 13,
CONSTITUTION OF IDAHO
(Vol. 1, Idaho Code, p. 55)

"In all criminal prosecutions, the party accused shall have the right to a speedy and public trial; *to have the process of the court to compel the attendance of witnesses in his behalf,* and to appear and defend in person and with counsel.
No person shall be twice put in jeopardy for the same offense; *nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law.*"

VOLUME 2, IDAHO CODE, PAGE 640
(10-502 Idaho Code)

"The instructions of the court to the jury, the refusal to give requested instructions where such refusal is noted in writing by the judge or court, the verdict of the jury, the findings and judgment of the court if the cause "be tried without a jury, any interlocutory order, ruling or decision appearing upon the records and files in the action or minutes of the court, all remarks of the court, the final decision in an action or proceeding, an

order or decision made in the absence of a party, *and rulings, orders and decisions upon objections to evidence o · any contested proceedings at a trial reported in the stenographer's notes of the evidence and proceedings upon a trial are deemed excepted to.* Rulings, orders and decisions appearing upon the records, files or minutes need not, unless desired by the party objecting thereto, be embodied in a bill of exceptions, but the same appearing in the records, files or minutes may be reviewed upon appeal as though settled in such bill of exceptions."

VOLUME 62 IDAHO REPORTS, PAGE 11
(Rule 63)

"In criminal cases when a decision is filed by this court the clerk shall immediately notify the respective counsel in writing of such fact and the date thereof. In case a petition for rehearing shall be filed, judgment shall not be entered by the clerk until ordered by the court. *If a petition for rehearing be not filed upon the expiration of twenty days from the filing of such decision,* judgment shall be entered upon the minutes of the court in accordance therewith and a certified copy thereof forthwith remitted to the clerk below."

E. A concise statement of the case containing the facts material to the questions presented are, as follows:

On the morning of December 29, 1952, one Donald Lee Fedder was driving an automobile, registered in the name of the mother of this petitioner, in the generally Northerly direction from Tetonia, Idaho, to Driggs, Idaho. A road block was placed at the city limits of Driggs, Idaho, and when the car failed to stop, the officers shot into one of the tires causing the motor vehicle to careen into an irrigation syphon. When the officers examined into the car they found only Donald Lee Fedder, who was pinned against the dashboard when the load in the car pushed the front seat forward. Donald Lee Fedder was taken into custody and charged with burglary. The next day about noon the petitioner was seen in the vicinity of Driggs and it having been ascertained that Donald Lee Fedder was driving the automobile, which was registered in the name of petitioner's mother, petitioner was also arrested and charged with the same burglary for which Fedder was charged. The two before named persons, namely, Donald Lee Fedder and Floyd Johnson, were charged separately by separate informations in the state courts. Donald Lee Fedder retained Black and Oliver of Pocatello, Idaho, to represent him, and Floyd Johnson retained James W. Blaine of Boise, Idaho, as his attorney.

Shortly after the arrest of the petitioner herein, Mr. Blaine took a statement from the witness, Donald Lee Fedder, in which statement the witness, Fedder, completely exculpated the petitioner from any involvement in the alleged burglary for which they were both charged. A copy of this statement was in the record before the Supreme Court of the State of Idaho in the

petition for rehearing, and is attached hereto, together with an affidavit of James W. Blaine, at page 64-67 of the Appendix.

On the 20th day of October, 1953, Donald Lee Fedder was tried in the state courts of Idaho upon a separate information and by a separate trial. He was convicted on the charge of burglary. On the following 17th day of February, 1954, the petitioner herein was tried under a separate information and by a separate trial from that of Fedder. At the early stages of petitioner's trial the name, Donald Lee Fedder, was injected into the evidence as the person who was apprehended pinned against the dash of the wrecked station wagon. It was proved and admitted that the station wagon was registered in the name of the mother of the petitioner. It further developed that the petitioner herein and Donald Lee Fedder had been business partners and had made a trip from Boise, Idaho, to Idaho Falls, Idaho together on the day before the alleged burglary. The testimony of the State concerning Donald Lee Fedder, Fedder's participation in the crime, and the fact of his friendship and business relationship with the petitioner was built up by witnesses on the part of the State as is illustrated by the following numerous references to the transcript of the evidence in the trial court, as follows:

Tr. f. 78, p. 27; f. 81, p. 28; ff. 110-111, p. 37; f. 164, p. 55; f. 180, p. 61; f. 197, p. 66; f. 198, p. 67; f. 309, p. 104; ff. 319-320, p. 107; f. 391, p. 131; f. 395, p. 132; f. 397, p. 133; f. 399, p. 134; f. 400, p. 134; f.

10, p. 137; f. 496, p. 166. (see Certified record from upreme Court of the State of Idaho)

After this extensive build-up of Fedder, this prominently conspicuous witness was produced as a witness r the State. The climax was, of course, sensational id condemning insofar as this petitioner is concerned. he witness simply declined to testify on the grounds at his testimony might tend to incriminate him. The roceedings at the trial were as follows: (Tr. ff. 509-1, pp. 170-171). Mr. Sharp was the prosecuting attorney; Mr. Blaine represented the petitioner.

"By Mr. Sharp:

Q. Will you state your name, please?

A. Donald Fedder.

Q. And where do you live, Mr. Fedder?

A. Blackfoot, Idaho.

Q. Mr. Fedder, directing your attention to the night of December 29th, 1952, did you on that evening have occasion to be in *Tetonia*, Idaho?

A. I have a statement here, to read—I claim the privilege of not testifying in this case on the grounds it may tend to incriminate me under Article I, Section 13 of Idaho Constitution and the 5th Amendment to the United States Constitution; on the advice of my attorney, John R. Black, Pocatello, Idaho.

Mr. Sharp: Well, we will let the Court rule on that.

The Court: Your other case is on appeal?

A. (Witness) Yes.

The Court: I will rule that the witness does not have to answer.

Mr. Sharp: Thank you, Mr. Fedder.

Mr. Blaine: We will want Mr. Fedder to stay here, I will want to call him as a witness myself, I believe.

The Court: Yes, all witness will remain unless excused by the Court."

The witness having refused to testify on the direct examination there was nothing concerning which Mr. Blaine the petitioner's attorney, could cross-examine. Petitioner then called Mr. Fedder as his own witness. At this point we comment that the alleged burglary occurred at Tetonia, Idaho, and in his examination of the witness, Fedder, the prosecuting attorney inquired of Fedder's presence in *Tetonia*, Idaho, on the 29th day of December, 1952. The arrest of Fedder occurred at the city limits of *Driggs*, Idaho, a community twenty (20) miles distant. In Mr. Blaine's direct examination of Mr. Fedder he made no inquiries whatsoever concerning whether Fedder was at Tetonia, Idaho, but the direct examination proceeded, as follows:

"DIRECT EXAMINATION

By Mr. Blaine:

Q. Your name is Donald Lee Fedder?

A. Yes.

Q. And you previously have been sworn to testify in this case?

A. Yes I have.

Q. And where is your home?

A. In Blackfoot.

Q. And calling your attention to December *28th* and the morning of December *29th*, would you please state whether or not you were in Driggs, or the vicinity of *Driggs*, Idaho?

A. I have a statement here I wish to read—the same as I read before—I claim the privilege of not testifying in this case on the grounds it may tend to incriminate me under Article I Section 13 of the Idaho Constitution and the 5th Amendment to the United States Constitution, on the advice of my attorney, John R. Black, Pocatello, Idaho.

The Court: Gentlemen, I think this witness is entitled to the privilege. He may be excused.

Mr. Blaine: Very well.—Call Mr. Johnson."

The above two excerpts of the testimony of the witness Fedder constitute the full and complete examination of Mr. Fedder in this action. The court made no inquiry whatsoever into the merits of Fedder's claim, except to ascertain that Fedder had appealed his conviction, that his appeal was still pending, and on that basis, and on that basis alone, the trial court extended to the witness, Fedder, the privilege of refusing to testify.

As appears from the affidavit of James W. Blaine appearing in the Appendix at page 64-67, the witness

Fedder had been interviewed by Mr. Blaine shortly after the occurrence of the alleged offense at which time the witness Fedder completely exculpated the petitioner from involvement in the commission of this crime. It is unknown to counsel what the prosecuting attorney expected to obtain from this witness when the witness Fedder was placed upon the stand as a State's witness, unless it was to obtain from the witness the claim of privilege which would be so completely damaging to this petitioner. Under the rules of evidence, however, since this witness testified to nothing on direct examination, the petitioner could not cross-examine him to draw out this material testimony from the witness Fedder which would exculpate petitioner from involvement in this offense. Petitioner then called Fedder as his own witness and the examination of the witness took the same identical turn, except that the court didn't even make an inquiry as to the surrounding circumstances under which Mr. Fedder claimed his privilege. The court simply stated "Gentlemen, I think this witness is entitled to the privilege. He may be excused." Insofar as the petitioner was concerned he had every reason to believe that if the witness would testify he would testify in accordance with his prior statement which exculpated this petitioner. On the other hand, if the witness testified to some other version which was inconsistent with his prior statement, Mr. Blaine was there in court with his notes which he had taken from the witness Fedder, and was in a position to impeach him with prior inconsistent statements. Therefore, it was quite immaterial as to what the wit-

ness Fedder testified to, but it was extremely material that he testify to something.

In view of the circumstances of the build-up of the witness Fedder by the numerous references to him from the lips of prior witnesses, and in view of the fact that it was developed in the case that Fedder was the friend of petitioner, that he and the petitioner had made a trip from Boise, Idaho, to Idaho Falls, Idaho on the day prior to the alleged offense, that Fedder had petitioner were business associates, and Fedder was actually apprehended in an automobile which was admittedly owned by petitioner's mother, his taking the stand and refusing to testify under the Fifth Amendment of the Constitution of the United States upon the ground that his testimony might criminate him, was the most damaging turn of events which could have happened at the trial insofar as petitioner is concerned.

F. The federal questions here sought to be reviewed were raised in the state's courts, as follows:

Under Section 10-502 I.C., above cited under Paragraph D, page 9, all rulings, orders and decisions upon objections to evidence or any contested proceedings at the trial reported in the stenographer's notes of the evidence and proceedings upon a trial are deemed excepted to. Therefore, no special exception was noted or made at the time that the trial court extended to the witness Fedder the privilege of refusing to testify.

Upon his appeal to the Supreme Court of the State of Idaho, the petitioner raised this federal question by assignment of error, as follows:

"The court erred in allowing the witness, Donald Lee Fedder, to claim his privilege of not testifying on the ground that such testimony might incriminate him under Article I, Section 13 of the Idaho Constitution and the 5th Amendment of the Constitution of the United States." (Page 2, Appellant's Opening Brief on Appeal to the Supreme Court of the State of Idaho)

In disposing of this assignment of error the Supreme Court of the State of Idaho in its decision reported at Volume 247 Pac. 2nd, page 425 (429) held as follows:

"Appellant assigns error of the trial court in permitting the witness, Donald Lee Fedder, to assert his constitutional privilege of refusing to testify, under Article I, Section 13 of the Constitution of the State of Idaho and the Fifth Amendment of the Constitution of the United States, on the ground that his testimony may tend to incriminate him.

Fedder was involved in the matters here under consideration as is shown by the record herein; shortly before, he had been tried and convicted of the crime of burglary of the first degree. His perfected appeal to this court, from the judgment of conviction, had not been disposed of as of the time of the trial of appellant.

Appellant asserts that under such circumstances, Fedder's testimony could not tend to incriminate him and that the constitutional privi-

lege cannot attach. Fedder had not as yet been acquitted of the charge of first degree burglary, and no certainty attained that his conviction of the charge was final. The criminal action was still pending against him. His testimony or aspects thereof, if given as a witness at appellant's trial, might well react adversely and tend to incriminate him, should he be granted a new trial upon disposition of his pending appeal. Under the circumstances the trial court properly allowed Fedder to assert his constitutional immunity."

In his petition for rehearing to the Supreme Court of the State of Idaho, the petitioner sought a reconsideration of this sole federal question. (Petition for rehearing at page 56-72 in the Appendix).

Although the opinion on the original decision was unanimous, upon the petition for rehearing the court split in a four-one decision reported at Volume 287, Pac. 2nd, page 425 (432) as follows:

"The judgment is affirmed. TAYLOR, C. J., and KEETON, PORTER and ANDERSON, JJ., concur.

On Petition for Rehearing

KEETON, Justice

In a petition for rehearing appellant contends that certain questions asked the witness Fedder, if answered, could not tend to incriminate the witness. Hence his refusal to answer and the failure of the court to order the witness to answer is error.

I have re-examined the contention and am of the opinion that it has merit. Without further elaboration, I think the petition for rehearing should be granted."

G. Not applicable to this case.

H. As for an argument amplifying the reasons relied on for allowance of this petition for writ of certiorari, petitioner states, as follows:

This petition for writ of certiorari embraces two distinct subjects of law:

1. Under what circumstances may a witness claim the privilege under the Fifth Amendment of the Constitution of the United States of America to refuse to testify on the grounds that his answers might criminate him; and,

2. To what extent may a state trial court deprive an accused of evidence in support of his theory of innocence before such deprivation amounts to a trial and conviction without due process of law as forbidden by the Fourteenth Amendment to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States of America provides as follows:

"AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases

arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article I Section 13 of the Constitution of the State of Idaho provides as follows:

"13. Guaranties in criminal actions and due process of law.—In all criminal prosecutions, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and with counsel.

No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law."

It was under these two sections that the witness, Donald Lee Fedder, refused to testify.

The entire and complete interrogation of Fedder by the prosecuting attorney was as follows:

"By Mr. Sharp:

Q. Will you state your name, please?

A. Donald Fedder.

Q. And where do you live, Mr. Fedder?

A. Blackfoot, Idaho.

Q. Mr. Fedder, directing your attention to the night of December 29th, 1952, did you on that evening have occasion to be in *Tetonia*, Idaho?

A. I have a statement here, to read—I claim the privilege of not testifying in this case on the grounds it may tend to incriminate me under Article I, Section 13 of the Idaho Constitution; and the 5th Amendment to the United States Constitution; on the advice of my attorney, John R. Black, Pocatello, Idaho.

Mr. Sharp: Well, we will let the Court rule on that.

The Court: Your other case is on appeal?

A. (Witness) Yes.

The Court: I will rule that the witness does not have to answer.

Mr. Sharp: Thank you, Mr. Fedder.

Mr. Blaine: We will want Mr. Fedder to stay here, I will want to call him as a witness myself, I believe.

The Court: Yes, all witness will remain unless excused by the Court."

The entire and complete interrogation of the witness, Fedder, by the petitioner was as follows:

"DIRECT EXAMINATION

By Mr. Blaine:

Q. Your name is Donald Lee Fedder?

A. Yes.

Q. And you previously have been sworn to testify in this case?

A. Yes I have.

Q. And where is your home?

A. In Blackfoot.

Q. And calling your attention to December *28th* and the morning of December 29th, would you please state whether or not you were in *Driggs*, or the vicinity of Driggs, Idaho?

A. I have a statement here I wish to read—the same as I read before—I claim the privilege of not testifying in this case on the grounds it may tend to incriminate me under Article I Section 13 of the Idaho Constitution and the 5th Amendment to the United States Constitution, on the advice of my attorney, John R. Black, Pocatello, Idaho.

The Court: Gentlemen, I think this witness is entitled to the privilege. He may be excused.

Mr. Blaine: Very well.—Call Mr. Johnson."

Other than being asked his name and place of residence, the prosecuting attorney simply asked the witness, Fedder, as to whether or not he was in the vicinity of *Tetonia*, Idaho, on the evening of December 29, 1952.

Other than being asked his name and his place of residence and whether or not he had been previously

sworn to testify, the solitary question which asked by the petitioner was whether or not he (Fedder) was in the vicinity of *Driggs*, Idaho, on the 29th day of December, 1952.

To both of these questions the witness refused to answer on the grounds that his testimony might criminate him. To neither of these questions could any direct, positive answer have possibly criminated the witness. It was no more against the law for Fedder to be in the vicinity of Tetonia or Driggs, Idaho on that occasion than it was for any other person to be in the vicinity of those towns.

An almost identical circumstance arose in the case of Ex parte Bommarito, (Mich) 259 N.W. 310. This last mentioned case was cited with approval by the Oregon Supreme Court in the case of In re Jennings, 59 Pac. 2nd, 702 and at page 712. The Supreme Court of the State of Oregon approved the reasoning of the Bommarito case as follows:

> "In Ex parte Bommarito, 270 Mich. 455, 259 N.W. 310, 311, it appeared that one James Hayes, while visiting in the City of Detroit, Michigan, was murdered on the night of October 3rd or the morning of October 4, 1934. The two petitioners were accused of the murder and were arrested, but were later released. Shortly thereafter they were again taken into custody to be held as material witnesses against Sam Finazzo and Tony Abato, who were now accused of the murder. Upon the trial of the two men just named, the petitioners were

asked: "Were you in Detroit on the morning of October 4th—the night of October 3rd of this year?" Each declined to answer, claiming the benefit of the privilege against self-crimination. Each was adjudged guilty of a contempt and each instituted a proceeding for a writ of habeas corpus. In sustaining the convictions, the Michigan Supreme Court declared: "These petitioners, however, though aided by counsel, objected too soon. Admission of their presence in Detroit on the day in question, could not, or even might not, incriminate them any more than any one else in the city on that day. Neither a 'yes' or 'no' could do this, and there could be no other answer. To hold otherwise would be to ignore the population of the fourth city of our Nation and be influenced in our decision by what the next question might have been." In a preceding paragraph the court had pointed out that: "The witness himself is not the sole judge of whether his testimony will tend to incriminate himself, but he must answer a question put to him unless the answer may actually tend to criminate him."

One of the earliest cases setting forth the principles governing the privilege against self-crimination as guaranteed by the Fifth Amendment of the Constitution of the United States of America is the case of *U. S. vs. Burr*, 25 Fed. Cas., page 38, No. 14692e.

This case has been interpreted to set forth the following legal principles:

"(1) Generally, every person is compellable to bear testimony in a Court of Justice;

"(2) An exception of this rule has created a settled maximum of law that no man is bound to criminate himself;

"(3) It is the province of the Court to judge whether *any direct answer* to *the question* which may be proposed will furnish evidence against the witness;

"(4) If a *direct answer* to the question *will not criminate* the witness, *he must answer;*

"(5) But, if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be to answer the question or not;

"(6) The privilege includes a fact which would form a necessary and essential part of this crime. See bottom column 1, page 708 of Volume 59 Pac. 2nd."

In this case at bar the questions asked Fedder were such that no direct answer to the questions could have possibly criminated him. Under the doctrine of the Burr case and numerous other cases hereinafter cited, it was the duty of the witness, Fedder, to answer.

At the trial of your petitioner the court did inquire as to the status of the witness, Fedder, as a defendant in a criminal action, and the questions and answers concerning this subject were as follows at the time that the prosecuting attorney was examinning Fedder:

"Mr. Sharp: Well, we will let the Court rule on that.

The Court: Your other case is on appeal?

A. (Witness) Yes.

The Court: I will rule that the witness does not have to answer."

At the time that the petitioner was examining Fedder no inquiry was made at all concerning the right of witness to decline to testify, but the court simply ruled as follows:

"The Court: Gentlemen, I think this witness is entitled to the privilege. He may be excused."

In its reported decision by the Supreme Court of the State of Idaho our Supreme Court of the State of Idaho ruled as follows:

> "Fedder had not as yet been acquitted of the charge of first degree burglary, and no certainty attained that his conviction of the charge was final. The criminal action was still pending against him. *His testimony or aspects thereof if given as a witness at appellant's trial, might well react adversely and tend to incriminate him,* should he be granted a new trial upon disposition of his pending appeal. *Under the circumstances* the trial court properly allowed Fedder to assert his constitutional immunity."
> (Emphasis supplied)

In other words, both the trial court and the Supreme Court of the State of Idaho have taken the position that

the singular fact that the witness is an accused is a sufficient grounds to claim the privilege to refuse to testify *at all* under the Fifth Amendment of the Constitution of the United States of America and Article I Section 13 of the Constitution of the State of Idaho.

We find no case wherein any court, either state or federal, has laid down the rule that the singular circumstance that a witness occupies the position of being an accused entitles such a witness to a blanket immunity from testifying at all under the state or federal constitutions. The rule seems to be clearly that the immunity, when it exists, *exists only to the particular question asked—not to questions which conceivably might be asked, and the privilege must be claimed as to each question* and the court should decide and rule upon the claim of the privilege in accordance with those fundamental principles which were laid down in the Burr case.

See the following cases:

In re Jennings, 59 Pac. 2nd, 702
State vs Bond, 12 Idaho 424 (434)
In re Stewart, 209 Pac. 850
29 Michigan Law Review 198
Brown vs U.S., 276 U.S. 134
Ex parte Devine, 74 Fed. 954 (960)
Coleman vs Glavin, 177 Pac. 2nd, 606
Ex parte Bommarito, 259 N.W. 310
Mason vs U.S., 244 U.S. 362; 37 Sup. Ct. 621; 61 L. ed. 1198.

When the witness, Donald Lee Fedder, claimed the privilege to refuse to testify on the grounds that his answers might criminate him, and claimed that privilege under the Fifth Amendment of the Constitution of the United States of America, a federal question then and there became involved in this case. When the trial court and the Supreme Court of the State of Idaho observed that the witness, Fedder, was an accused in a criminal proceedings and that his appeal was still pending and that that singular circumstance was sufficient grounds to justify Fedder's to refuse to testify at all, stating that his testimnoy or some aspects of his testimony might incriminate him, we urge that our trial court and the Supreme Court of the State of Idaho decided that federal question in a way which *is not in accord with the federal decisions on that subject*, and that the ruling by the Idaho trial court and the Supreme Court *are out of harmony with the decisions of every other state in the union which we can find.*

If the court of the State of Idaho has decided a federal question of substance in a way which is probably not in accord with the applicable decisions of the Supreme Court of the United States of America, and under such circumstances the accused petitioner was adjudged guilty and sentenced to serve fifteen (15) years in the penitentiary of the State of Idaho, does such a fact create a situation where that accused has been deprived of his liberty without due process of law by the State of Idaho in violation of the Fourteenth Amendment to the Constitution of the United States?

By the Sixth Amendment to the Constitution of the United States of America an accused in a criminal proceedings is guaranteed the right to have compulsory process for obtaining witnesses in his favor as follows:

"AMENDMENT 6

(Rights of the accused.)—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; *to have compulsory process for obtaining witnesses in his favor,* and to have the assistance of counsel for his defense."

Article I Section 13 of the Constitution of the State of Idaho guarantees the same right to compel the attendance of witnesses in his behalf as follows:

"13. Guaranties in criminal actions and due process of law.—In all criminal prosecutions, the party accused shall have the right to a speedy and public trial; *to have the process of the court to compel the attendance of witnesses in his behalf,* and to appear and defend in person and with counsel.

No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be a witness against himself; *nor be deprived of life, liberty or property without due process of law.*"

In the State of Idaho the statutes of this state have re-enacted the guaranties requiring the compulsory attendance of witnesses. Section 9-1302 Idaho Code provides as follows:

"9-1302. Privilege of witnesses—Questions required to be answered.—A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim "against himself; but he need not give an answer which will have *a tendency to subject him to punishment for a felony;* nor need he give an answer which will have a direct tendency to degrade his character, unless it be the very fact in issue, or to a fact for which the fact in issue would be presumed.

But a witness must answer as to the fact of his previous conviction for felony."

The due process clause of the Fourteenth Amendment of the Constitution of the United States of America specifically provides that no state shall deprive any person of life, liberty or property without due process of law as follows:

"1. (Citizenship—Due process of law—Equal protection.)—All persons born or naturalized in

the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws."

In this case there was circumstantial evidence tending to link the petitioner herein with the alleged offense. This was commented on by the Supreme Court of Idaho in its decision. The only two eyewitnesses as to whether or not this petitioner was involved in this alleged burglary was the witness, Johnson, and the witness, Fedder. The witness, Johnson, did take the stand and denied having any involvement in the alleged burglary and accounted for his whereabouts substantially in the same manner as Fedder accounted for them at the time that Fedder had given a statement to James Blaine, a copy of the notes from which said interview is attached at page 65 of the Appendix. When the witness, Fedder, was called to the stand and refused to testify on the grounds that his testimony might incriminate him, the effect of such refusal to testify on such grounds naturally weighed heavily in the minds of the jury in the light of the other circumstantial evidence to the effect that Fedder and the petitioner were business partners, were friends, had made a trip from Boise, Idaho, to Idaho Falls, Idaho, that petitioner had

been left in Driggs, Idaho, and that at the time that Fedder was apprehended with the alleged stolen merchandise the witness Fedder was in an automobile which was registered in the name of the petitioner's mother. In the light of Fedder's previous statements to James Blaine, petitioner had a right to believe that if the witness, Fedder, had been compelled to testify under oath that his testimony would have absolved and exculpated petitioner of any involvement in the alleged offense. By the court's permitting the witness to refuse to testify, the petitioner was thereby deprived of the testimony of the only other person who was possessed of personal knowledge of whether or not petitioner was with Fedder at the time Fedder committed this alleged offense. Had the witness, Fedder, testified that petitioner was not with him, that evidence would have been conclusive of petitioner's innocence. Had Fedder testified that petitioner was with him, James Blaine, the attorney to whom Fedder had made the prior statement, and who was then present at the trial of petitioner, could have confronted Fedder with his prior statement, and an issue would have thereupon been created to be decided by the jury as to which story by Fedder was to be believed. For the witness, Fedder to be permitted to refuse to testify on the ground that his testimony might incriminate him, the trial court closed the door on the petitioner to have the benefit of exculpating evidence or at least to create the issue as to whether Fedder was telling the truth the first time he made the first statement, or whether he was telling the truth at the time of trial. In any event, petitioner was

denied his constitutional rights to compel witnesses to attend on his behalf and to compel those witnesses to testify to something. Petitioner was not only denied a trial according to due process of law, but the circumstances giving rise to this denial of due process actually worked to the prejudice of the petitioner when witness, Fedder, the friend of the petitioner, the business associate of the petitioner, the witness who was apprehended in the automobile owned by the petitioner's mother, said that he could not testify because his answers might incriminate him.

This petition is made directly to this Honorable Court for the reason that the remittitur from the Supreme Court of the State of Idaho was returned to the trial court before this petition could be filed in the said Supreme Court of the State of Idaho.

Respectfully Submitted,

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APPENDIX

IN THE SUPREME COURT
OF THE STATE OF IDAHO

No. 8202

STATE OF IDAHO, *Plaintiff-Respondent,* v. FLOYD JOHNSON, *Defendant-Appellant.*	Pocatello, April Term, 1955 Filed June 29, 1955 Clay Koelsch, Clerk

Appeal from the District Court of the Ninth Judicial District of the State of Idaho, in and for Teton County. Honorable Preston Thatcher, Presiding District Judge. Appeal from judgment of conviction of burglary of first degree and from order denying a motion for a new trial. Judgment *affirmed.*

James W. Blaine and Charles R. Donaldson, Boise for appellant.

Graydon W. Smith, Attorney General, J. R. Smead, Assistant Attorney General, Boise, John M. Sharp, Special Assistant Attorney General, Idaho Falls, and H. S. Forbush, Teton County Prosecuting Attorney, Driggs, for respondent.

SMITH, J.

Respondent charged appellant with burglarizing the Tetonia Club in Tetonia, during early morning of December 29, 1952. Appellant stood trial and a jury convicted him of burglary of the first degree. He appealed from the judgment of conviction and the order denying his motion for a new trial.

The entry of the Tetonia Club and the taking of four slot machines therefrom were observed by Mr. and Mrs. Berry living about 130 feet from the front of and across the street from the Tetonia Club building, who notified law enforcement officers by telephone of such entry.

About 4:30 o'clock A. M., December 29, 1952, during stormy weather with snow, a station wagon, without lights, driven on its driver's left hand side of the road, stopped at a point almost across the street from the Tetonia Club. Two men got out; they did not appear to be carrying any tools. They crossed the street and without hesitation entered the club building; shortly they came out of the building, each with a slot machine which he carried across the street and put into the station wagon. They returned to and entered the club building and came out, and each again carried a slot machine which he placed in the vehicle.

The two men then got into the station wagon and drove away without lights toward Driggs, and did not turn on the lights until at a turn in the road, after traveling about a city block.

The sheriff of Teton County and his deputy, who was also the marshall of Driggs, set up a road block on the highway at the north city limits of Driggs. No tracks appeared in the fresh snow on the highway. They were looking for a station wagon and when such a vehicle came along the driver failed to heed the stop signal but speeded up and ran the road block. The deputy then shot at and hit the front tire of the station wagon, which, after traveling about 440 feet further down the road, went out of control on the west side of the highway, ran into a cement culvert or abutment and came to a stop. The two officers cautiously ap-

proached the vehicle, a 1952 Pontiac station wagon, which had been out of their sight for a short time and distance after it had stopped. The deputy sheriff observed human footprints leaving the vehicle on its right hand side. They found a man pinned in by the front seat which had been pushed ahead by a load of seven slot machines from behind. This man was Donald Lee Fedder, who was injured. The two officers took him to the county jail, which consumed about twenty minutes.

When the officers and two others returned to the wrecked station wagon the deputy observed an additional set of human footprints crossing the road and approaching the car from the left hand side, and then going around the car to the right hand door. A brown coat, a cap and sweatshirt, which the officers had observed previously, were gone from the interior of the car. The officers attempted to follow the tracks for a time but gave up and set a road block.

During the day of December 29, 1952, the sheriff and other officers ascertained that five slot machines had been taken from the Tetonia Club, but nothing else therein had been disturbed. One Williams owned the club and its contents, including the five machines, and he and his assistants at the club identified those machines as five of the seven machines found in the station wagon. No one who had anything to do with the club, being the owner, the manager and the bartender had arranged any sale, transfer or other disposition of

any of the club's slot machines. Only the manager and bartender had keys to the club. The bartender, when he cleaned the club during Sunday afternoon, December 28, 1952, saw the machines therein. The officers also ascertained that the front door key would not work in the front door lock and the padlock on the back door had been twisted off and broken; tracks led from the back door around to the highway; marks were found on the front door and the door casing, made by a hard instrument, in the general area of the lock, and metal in the door frame, a part of the lock, was sprung.

A search was conducted for the man who had left the station wagon by its right hand door, leaving tracks. Late in the day of December 29, 1952, a man, appellant herein, was apprehended in a sagebrush field about five and one-half miles south of Driggs. He had about $800 on his person.

The foregoing facts and circumstances are not in dispute.

Additional undisputed, as well as disputed, facts and circumstances, will now be reviewed in the light of appellant's assignment of error, that the evidence is insufficient to sustain the verdict of the jury, which appellant also urged in his motion for a new trial.

Appellant, testifying in his own behalf, stated that he was authorized by the federal government to deal

in coin operated amusement devices, and had slot machine dealings with Fedder during the previous two and a half months; that with about $800 he left Boise with Fedder Sunday, December 28, 1952, about 3:30 to 4:00 o'clock P.M., driving his mother's 1952 Pontiac station wagon, to buy slot machines, arriving in Idaho Falls at about 9:30 that evening; then, as appellant stated, Fedder met a man, whom appellant did not know, had not met and never did meet, and that Fedder and that man conversed out of hearing of appellant; then Fedder informed appellant that he, appellant, was not to be in on "the transaction." Appellant then decided to drive to Driggs and visit one Markham, his brother-in-law's brother; the other man would go to Driggs in his own car, a 2-door gray Chevrolet.

Appellant testified that then he and Fedder drove to Driggs, arriving there about 11:30 P.M., December 28, 1952; that the other man, waiting in his Chevrolet in front of a cafe, drove his car, following appellant and Fedder in the station wagon; that appellant got out at the north end of the city of Driggs, which he states was in the vicinity of the Markham house; then Fedder, stating he would be back in about an hour, drove the station wagon toward Tetonia, and the other man followed in the Chevrolet. Here the Chevrolet, if such there was, disappears from the record.

Appellant further testifying, stated that he went to the Markham house and finding it dark, did not try to arouse any occupant therein. Here, Markham disap-

pears from the record. Appellant then sat down in a 1938 Plymouth nearby where he stayed until he heard shots, which time, according to the deputy sheriff, was 5:12 A.M., the following morning; and then appellant got out of the Plymouth car and observed a man approaching who acted like he was hurt and winded; that appellant called to him and recognized him as the man he had previously seen in Idaho Falls; that this man told appellant that he and Fedder had a wreck and Fedder was hurt; that thereupon appellant decided to leave the vicinity since he knew somebody would be following the tracks made by this other man; and that he, appellant, would be detained if found there, since twice previously he had been convicted and sentenced for burglary, once during 1934 in Ada County, and again during 1939 in Portland, Oregon. Then appellant, stating he did not know who the man was, nevertheless volunteered to "make a trail" for him and invited him to take appellant's place in the Plymouth car. Here the mysterious stranger and the Plymouth car, if such there were, disappear from the record.

Appellant stated that early morning aforesaid he was wearing a pair of dress trousers, a dress coat and no hat. He then ostensibly traced his movements up the highway to the station wagon, where he obtained his coveralls, brown coat and cap; his returning back to the vehicle after he had gone about a hundred yards, to get his sweatshirt and flashlight; his circling around in various directions, including going hand-over-hand along the top of a fence, thereby to throw officers off

his tracks; his hiding in a barn and in a refrigerator crate therein during the daytime of December 29th, and his traveling afoot until apprehended during the evening of that day in the sagebrush field about five and one-half miles south of Driggs.

Appellant, upon being apprehended, admitted his remark to the sheriff, "My name is Johnson; I want to see my attorney and how much is the bail." During his testimony appellant was asked why he went back to the wrecked automobile, to which he answered, "I went back to get my coat, it was cold." When appellant was being transported to Driggs, after being apprehended, a witness remarked to him, "A fine buddy you are, running off and leaving your buddy in the car," to which remark appellant made answer according to three witnesses, "I couldn't get him out, he claimed his leg was broken," and appellant admitted, "I might have" made such statement. When asked what he thought the lady would think about the wrecking of the car, appellant admitted it looked pretty bad to him the last time he saw it.

The coveralls which appellant wore when apprehended were identified by Mr. and Mrs. Berry as look-like or similar to the coveralls worn by one of the men, observed by them, taking slot machines from the Tetonia Club the early morning of December 29, 1952.

The deputy sheriff placed appellant's described location of the Plymouth car, as about three blocks from the

place where the Pontiac station wagon came to a stop. Appellant asserts that the deputy found the Plymouth car at the place as appellant had described it to be; but the record shows only, that the deputy placed the locality, but not the car, as appellant had described such locality.

The 1952 Ada County registration certificate of the Pontiac station wagon, in which was shown its Ada County license number, was found in the vehicle showing its registration to be in the name of "Emma Malone" (with "F. J." following the name), who, appellant stated, is his mother. In the same envelope containing the station wagon's certificate of registration, was found the Ada County registration certificate of appellant's trailer.

The Pontiac station wagon when apprehended had on it Fremont County license plates, which the parties stipulated were stolen at Teton City December 27 or the morning of December 28, 1952. Nothing appears in the record relating to the license plates belonging to the station wagon, nor when or where appellant last drove that vehicle with its lawful license plates attached.

Appellant advanced the alibi that he could not have been in Teton City at either of the times stipulated when the Fremont County license plates were stolen at Teton City because he had not as yet left Boise. He attempted

to prove such alibi by proof of a $5.00 check dated December 28, 1952, made payable to cash (Def. Exhib. No. 2) which the maker testified she paid to appellant the afternoon of that date, supported by the testimony of appellant's wife.

Appellant criticizes respondent for introducing certain evidence, claiming unwarranted inferences may be draw therefrom. He points to the vice-grips (State's Exhib. No. "O") and the broken padlock (State's Exhib. No. "N"); also the pieces of wood, one from the front door and the other from the front door casing of the Tetonia Club showing the marks or indentations impressed into the wood (State's Exhibs. Nos. "H" and "I"), and the two certain tools taken from under the front seat of the station wagon (State's Exhibs. Nos. "M" and "N"). Respondent introduced such exhibits in evidence by the testimony of identifying witnesses, without further explanation.

Appellant's counsel then chose to develop whether or not the vice-grips had anything to do with breaking the padlock, in that he led the sheriff into expressing his opinion that they did; and at such counsel's request that such officer show marks on the broken padlock, "that a pair of vice-grips is going to make," the sheriff pointed out two marks thereon; also led the sheriff on to state, "We entered the lock and vice-grips in evidence, * * * because they had been forcibly broken, the lock had been forcibly broken;" then appellant's coun-

sel attempted to develop that the F.B.I. couldn't reach a definite conclusion in the premises, although he did not offer evidence to substantiate such a conclusion.

Appellant's counsel then turned to the pieces of wood from the front door and door casing of the Tetonia Club and the two tools which respondent had introduced in evidence (State's Exhibs. Nos. "H", "I", "M" and "O"). He again attempted to develop that the F.B.I. were not prepared to give any answer as to the two tools and the marks in the pieces of wood, but again, did not offer substantiating evidence in the premises.

State's Exhibs. Nos. "H", "I", "M", "N", "O" and "P" were properly introduced in evidence. There was sufficient connection between the exhibits, the burglary and the possession of the tools (State's Exhibs. Nos. "M", "N" and "O") to admit the same in evidence, inasmuch as the tools themselves so admitted were capable of making the entry and their admission was not error. State v. Kleier, 69 Idaho 278, 206 P. 2d 513.

Appellant points out wherein the sheriff's testimony on direct examination differed in some respects with that elicited from him on cross-examination with reference to his observance of the tracks leading to and from the station wagon and when he saw appellant's articles of clothing in the vehicle; also, that it is impossible to ascertain definite facts concerning the tracks from the sheriff's testimony; and asserts that the con-

flict in the evidence is by reason of conflict in the testimony of respondent's witnesses.

Now with reference to the tracks leading to and from the station wagon and appellant's clothing therein, the deputy sheriff, the sheriff and appellant himself testified with reference thereto; and particularly, appellant by his own testimony admitted that he made the tracks and that the clothing which he took from the vehicle belonged to him. Under such circumstances the discrepencies in the sheriff's testimony, to which appellant refers, become immaterial. Moreover, the record is replete with appellant's evasive and contradictory testimony; particularly illustrative are some of the statements he evasively admits he made upon being apprehended; his evasive, and in instances, contradictory explanations relating to his clothing, his tracks, his whereabouts up to a short time after the stopping of the station wagon, and relating to the claimed mysterious third person, whom appellant never had met and didn't know.

Appellant points to the improbability of his remaining uninjured had he been in the station wagon when it came to a stop. He points to its high speed of an estimated 80 miles per hour as it ran the road block and coming to a sudden stop against a cement abutment or culvert, with considerable resultant damage to the vehicle; but he omits from his argument the fact that the station wagon came to a stop, after traversing an additional 440 feet.

It is within the province of the jury to believe or disbelieve the testimony of any witness, or any portion of such testimony, since the jury are the exclusive judges of his credibility. I.C., sec. 9-201; State v. Cacavas, 55 Idaho 538, 44 P. 2d 1110, and authorities therein cited; State v. Hansen, 67 Idaho 359, 181 P. 2d 192; State v. Davis, 69 Idaho 270, 206 P. 2d 271.

In a burglary prosecution it is sufficient to show unlawful intent when the entry was made, by circumstantial evidence. One's intent may be proved by his acts and conduct, and such is the usual and customary mode of proving intent. State v. Kleier, supra; Ex parte Seyfried, 74 Idaho 467, 264 P. 2d 685.

While the evidence is in conflict, there is sufficient substantial, competent evidence to sustain the verdict, and the question of fact was one exclusively for the jury. The jury having passed on the facts, there being substantial competent evidence to sustain the jury's verdict, the same will not be disturbed on appeal. State v. Steen, 29 Idaho 337, 158 P. 499; State v. Hart, 40 Idaho 71, 231 P. 671; State v. Kleier, supra.

Appellant assigns error of the trial court in permitting the witness, Donald Lee Fedder, to assert his constitutional privilege of refusing to testify, under Article I, sec. 13 of the Constitution of the State of Idaho and the Fifth Amendment of the Constitution of the United States, on the ground that his testimony may tend to incriminate him.

Fedder was involved in the matters here under consideration as is shown by the record herein; shortly before, he had been tried and convicted of the crime of burglary of the first degree. His perfected appeal to this court, from the judgment of conviction, had not been disposed of as of the time of the trial of appellant.

Appellant asserts that under such circumstances, Fedder's testimony could not tend to incriminate him and that the constitutional privilege cannot attach. Fedder had not as yet been acquitted of the charge of first degree burglary, and no certainty attained that his conviction of the charge was final. The criminal action was still pending against him. His testimony or aspects thereof, if given as a witness at appellant's trial, might well react adversely and tend to incriminate him, should he be granted a new trial upon disposition of his pending appeal. Under the circumstances the trial court properly allowed Fedder to assert his constitutional immunity. 70 C.J. 727, sec. 880; 58 Am. Jur. 72, sec. 84.

Appellant's third and fourth assignments of error attack asserted conduct of respondent's special prosecutor as to certain remarks made during his argument to the jury. Nothing whatever appears in the transcript of the record of appellant's trial concerning any such remarks, or asserted conduct. Appellant refers to such alleged conduct in the affidavit of his counsel in support of the motion for a new trial; therein such

counsel asserts that such prosecutor, in his opening argument, "confined his argument principally to castigating all the witnesses for the defendant as liars," and advised the jury "to the effect that if the attorney for the defendant believed that the defendant was innocent of the crime charged, he would have made application to the court for an advisory instruction to the jury to acquit the defendant."

Such affidavit does not purport to contain the exact language used by the special prosecutor; it only purports to give the substance of certain statements made by the prosecutor in the course of his argument, and such is too indefinite and uncertain for this court to consider in the light of reversible error. State v. Peck, 14 Idaho 712, 95 P. 515; State v. Gruber, 19 Idaho 692, 115 P. 1.

An assignment of error directed to the prosecutor's argument to the jury where the argument objected to is not preserved in the record, or any attempt made to have the portion of the argument objected to made a portion of the record, cannot be considered upon appeal. State v. Stevens, (Mont.), 172 P. 2d 299; State v. Cooper (Utah), 201 P. 2d 764; State v. Berry (Kan.), 223 P. 2d 726; People v. Cayer (Cal.), 228 P. 2d 70; Kallnbach v. People (Colo.), 242 P. 2d 222; Kidd v. State (Okl.), 266 P. 2d 992.

Appellant, in his last assignment, asserts that all the elements of the crime of burglary were not proven

in that no property rights exist in slot machines, which can only be used for gambling and lottery purposes, and have no value; that therefore there was failure to show an intent to steal personal property of another.

Appellant cites in support of his position, State v. Lymus (Ohio), 20 Am. Rep. 772, which held that a dog was not included within the purview of Ohio's larceny statute; Culp v. State (Ala.), 26 Am. Dec. 357, which held that an allegation of larceny of a bill of credit, as a chose in action, will not support an indictment on such a charge, if it appears that the bill of credit was of a character the issue of which was not authorized by an act of congress; and People v. Caridis (Cal.), 154 P. 1061, wherein the California Court distinguished a lottery ticket evidencing an indebtedness, which could not be a subject matter of larceny, from the ticket considered as a piece of paper possessed perhaps of an intrinsic value, which value, however small, would suffice to make its wrongful taking petit larceny.

Appellant also cites State v. Village of Garden City, 74 Idaho 513, 263 P. 2d 328, a civil case, wherein this court ruled that slot machines are included within the purvies of lotteries prohibited by Article III, sec. 20 of the Constitution of the State of Idaho and Idaho Code Title 18, ch. 49; and appellant particularly points to the ruling therein, "there is no property right in the gambling devices (slot machines) herein described."

The court in the Garden City case ruled that no

property rights exist in slot machines which can be sold by a public officer at public auction; also, that it is the use of the devices which violates the law; but the question, whether property of which the possession, sale, or use for certain purposes was unlawful, could be the subject matter of larceny, was not involved.

In People v. Odenwald (Cal.), 285 P. 406, the accused, convicted of burglary, contended that the intoxicating liquor which they intended to steal after unlawful entry was possessed by the owner thereof contrary to both the federal and state laws and therefore not the subject of larceny. The National Prohibition Act, 27 U.S.C.A., sec. 39, made it unlawful to have or possess any liquor, or property designed for the manufacture of liquor, in violation of the act, and that "no property rights shall exist in any such liquor or property." The California appellate court made exhaustive research of the subject matter; its reasoning, in adversely answering the accused's contentions, is as follows:

> "The authorities which hold that liquor so possessed cannot be the subject of burglary, * * * proceed upon the theory that, since one may not have a property right therein, the property itself cannot be stolen; that, inasmuch as it can have no legitimate or lawful value to the owner, it is without inherent value. We are not ready to accede to this reasoning. Regardless of its lawful or legitimate value, the appellants considered it of suffi-

cient inherent value to make it the subject of larceny.

* * *

"Focusing our attention upon the fiction that, because it has no legal value, it has no value at all, we must close our eyes to the fact that its illegal value (using that term solely for the purpose of distinction) is such as to arouse the lust of greed to create a new type of dangerous and vicious criminal, the one designated in common parlance as the 'hi-jacker.' Can he steal and rob and pillage with impunity simply because the object of his search cannot be made the subject of lawful possession or sale? The question shocks our sense of stabilized society, for the protection of which laws denouncing burglary and like offenses have been adopted."

And see the reasoning in State v. Schoonover (Wash.), 211 P. 758:

"The state punishes the wrongful taking of personal property belonging to or in the possession of another because of the offense against the majesty of its laws, and because of the inherent wickedness and criminality of the act, as well as because of the wrong done to the individual whose property is taken. Stated in another way, the state punishes larceny because it is larceny, and that the guilty may not escape, it will treat any form of personal property having actual value

as having value for the purposes of larceny, notwithstanding it may be unlawful for the possessor to have it in possession."

A discussion of the question raised by appellant indicating the great weight of authority as being in opposition to the premises which he advances is set forth in 32 Am. Jur. 985, sec. 75; therein it is stated:

"A thing may be the subject of larceny although it is unlawful for any person having such a thing to sell or otherwise dispose of it, or to use it for certain purposes, and even though it is unlawfully possessed at the time of the taking because kept or used for illegal purposes or because possession thereof is expressly prohibited by law. The authorities are in substantial agreement that such facts do not affect the character of the article as property which may be the subject of larceny. Thus * * * gambling paraphernalia, the possession of which is prohibited, and intoxicating liquors, outlawed or made contraband by statute, are all property to an extent sufficient to satisfy the requisites for the subject of larceny. Moreover, the fact that the possessor of such an article has no enforceable property rights therein does not require a contrary rule. The article may be the subject of larceny notwithstanding express statutes to the effect that no property rights shall exist in such articles illegally possessed, since the purpose of such statutes is to limit the civil rights of

the possessor, not the criminal liability of others." (Emphasis supplied).

See also Smith v. State (Inc.) 118 N. E. 954, L.R.A. 1918 D, 688; Osborn v. State (Tenn.), 92 S. W. 853 (rule recognized); Bryant v. State (Tex.), 87 S. W. 2d 722, wherein it was held that a slot machine, although it could not be legally possessed, nevertheless was the subject of robbery; 36 C.J. Larceny, sec. 41, p. 747; 52 C.J.S. Larceny, sec. 19, p. 813; Burgess v. State (Md.), 155 A. 153, 75 A.L.R. 1471 and Annotation 75 A.L.R. 1479. People v. Spencer (Cal.), 201 P. 130, contra, appears overruled by People v. Odenswald (Cal.), 285 P. 406.

The value and kind of property which became the subject of larcency upon a burglarious entry, is immaterial. All that is necessary is that the entry be made with intent to commit larceny. I.C., sec. 18-1401; State v. Dwyer, 33 Idaho 224, 191 P. 203; Ex Parte Seyfried, 74 Idaho 467, 264 P. 2d 685.

The examination of the record as a whole, considered in the light of appellant's assignments, presents no reversible error. The judgment is affirmed.

TAYLOR, C. J., KEETON, PORTER and ANDERSON, JJ., concur.

SUPREME COURT OPINIONS
On Petition for Rehearing
September 16, 1955

Re: State of Idaho v. Floyd Johnson
No. 8202
Petition for Rehearing Denied

KEETON, J., Dissenting:

In a petition for rehearing appellant contends that certain questions asked the witness Fedder, if answered, could not tend to incriminate the witness. Hence his refusal to answer and the failure of the court to order the witness to answer is error.

I have re-examined the contention and am of the opinion that it has merit. Without further elaboration, I think the petition for rehearing should be granted.

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,
Plaintiff-Respondent,

vs.

FLOYD JOHNSON,
Defendant-Appellant.

PETITION FOR RE-HEARING ON BEHALF OF DEFENDANT AND APPELLANT

COMES NOW, Floyd Johnson, the above named Defendant-Appellant, by and through his attorneys James W. Blaine, Esq., and Vernon K. Smith, Esq. of Boise, Idaho, and moves this Honorable Court to rehear and reconsider its decision made and filed in the above entitled action on the 29th day of June, 1955, and in support thereof, said Appellant states, as follows:

On or about the 17th day of February, 1954, and the following days, this Appellant was tried in the District Court of the Ninth Judicial District in the State of Idaho in and for the County of Teton, tried at Bingham County, Idaho, upon the charge of burglary in the first degree. That prior to said trial, to-wit: in about the first week of January, 1953, being within the period of about two weeks next following the occurance of the alleged burglary, James W. Blaine the

attorney for this appellant, conducted an investigation of various witnesses to ascertain the circumstances of such alleged burglary and the persons involved. That among other things the said James W. Blaine interviewed Donald Lee Fedder, an occupant in the Malone car at the time of its apprehension, and at said time the said Donald Lee Fedder made a statement which completely exonerated the appellant from any involvements in the alleged burglary in that the said Donald Fedder stated to the said James W. Blaine that the appellant herein was not present at the time of the alleged entry into the Teton Club. The affidavit of James W. Blaine together with the original notes taken at said interview by the said James W. Blaine are attached hereto and made a part of this petition by reference.

That thereafter but prior to the trial of this action the said Donald Lee Fedder was tried upon the charge of first degree burglary of the said Teton Club in Teton County, Idaho and in the course of his testimony the said Donald Lee Fedder related under oath in his own defense a statement which was inconsistent with the statement previously given to the said James W. Blaine in that the said Donald Lee Fedder testified that the appellant was present at the time of such entry into the said Teton Club. Reference is made to the transcript of the testimony now on file with this Honorable Court with the action entitled State of Idaho, Plaintiff, vs. Donald Lee Fedder, Defendant, Civil No. 8117.

That at the time of the trial of this appellant had on the 17th day of February, 1954, and the following

days, said Donald Lee Fedder was called as a witness by the State of Idaho and after a statement of his name and a statement of his place of residence, the said Donald Lee Fedder claimed his privilege to refuse to testify under Article I, Section 13, of the Constitution of the United States of America, and the court without inquiring into the nature of the testimony or the basis for such claim of privilege sustained the said witness, Donald Lee Fedder and halted further examination of said witness (See pages 170-171 and 190-191, transcript this action). That upon appeal this appellant assigned his error the allowance by the trial of the court to permit said Donald Lee Fedder to claim such privilege, as follows:

> The court erred in allowing the witness, Donald Lee Fedder, to claim his privilege of not testifying on the ground that such testimony might incriminate him under Article I, Section 13 of the Idaho Constitution and the 5th Amendment of the Constitution of the United States. (Page 2, Brief on appeal).

That in its decision this honorable court determined and based its decision upon such assignment of error as follows:

> Appellant assigns error of the trial court in permitting the witness, Donald Lee Fedder, to assert his constitutional privilege of refusing to testify, under Article I, Sec. 13 of the Constitution of the State of Idaho and the Fifth Amend-

ment of the Constitution of the United States, on the ground that his testimony may tend to incriminate him.

Fedder was involved in the matters here under consideration as is shown by the record herein; shortly before, he had been tried and convicted of the crime of burglary of the first degree. His perfected appeal to this court, from the judgment of conviction, had not been disposed of as of the time of the trial of appellant.

Appellant asserts that under such circumstances, Fedder's testimony could not tend to incriminate him and that the constitutional privilege cannot attach. Fedder had not as yet been acquitted of the charge of first degree burglary, and no certainty attained that his conviction of the charge was final. The criminal action was still pending against him. His testimony or aspects thereof, if given as a witness at appellant's trial, might well react adversely and tend to incriminate him should he be granted a new trial upon disposition of his pending appeal. Under the circumstances the trial court properly allowed Fedder to assert his constitutional immunity. 70 C.J. 727, sec. 880; Am. Jur. 72, sec. 84.

That at the time of the rendition of the decision of this Honorable Court in this above entitled action this said Honorable Court rendered a companion decision in the case entitled State of Idaho, Plaintiff-Respondent vs. Donald Lee Fedder, Defendant-Appellant, in which

said decision the judgment of conviction of the said Donald Lee Fedder was affirmed.

That thereafter the said Donald Lee Fedder was sought out and an affidavit was obtained under oath from the said Donald Lee Fedder setting forth the facts which he contends are true concerning the participation or lack of participation of this appellant in the alleged burglary or entry of the Teton Club. The original of the affidavit is attached hereto and made a part of this petition by reference.

This appellant now assigns as error the above ruling of this Honorable Court and for grounds and reasons therefore states as follows:

I.

That the fact as to whether or not Floyd Johnson was actually present is actually known by only three persons, to-wit:
Floyd Johnson himself, Donald Lee Fedder and a third person who is known only as George.

II.

That following the apprehension of the Malone car and the appellants arrest, counsel for this appellant made his effort to ascertain the identity and location of the third party known as George, (Folio 790, Page 264, transcript on Brief).

III.

That the said Donald Lee Fedder had previously made two contradicting statements concerning the involvement or participation of the said Floyd Johnson in said offense:

1. His testimony at his own trial wherein he contended that the said Floyd Johnson was present, and

2. His previous statement made to James W. Blaine, Esq., within two weeks next following the alleged offense in which he stated that the said Floyd Johnson was not present or involved in the alleged burglary.

IV.

That at the time of the trial counsel for Defendant-Appellant anticipated that the said Donald Lee Fedder would either testify consistently with his statement made to said counsel within two weeks next following the occurance or the alleged offense or that he would testify consistently with the testimony given at his own trial.

V.

That had the said Donald Lee Fedder been refused the privilege of claiming his rights under Article I, section 13, of Constitution of the United States and he had testified consistent with the previous statement made to the said James W. Blaine within two weeks next following the occurance of the alleged burglary

such testimony would have been in support of defendants theory of innocence; whereas had said defendant testified inconsistent with such former statement, the said James W. Blaine was available to impeach said witness by asking impeaching questions, and if necessary would have taken the stand to testify concerning such former statement.

VI.

That without such foundation having been laid, giving the said witness either the opportunity to affirm his statements made to the said James W. Blaine, above referred to, or to deny the same, the opportunity to get such facts pertaining to such former statement was not available to the defendant and such evidence would have been inadmissable.

VII.

That although the decision of this court may have been just under the circumstances that the appeal of the said Donald Fedder was still pending at the time he claimed his privilege, now however, the conviction of the said Donald Lee Fedder has been sustained and affirmed and insofar as is known to this appellant no petition for rehearing has been filed in said case and right and justice in the light of the proceedings together with the attached affidavits do now require that this petition for rehearing be granted, that a new trial be ordered and that the defendant be allowed to sub-

poena and compel said witness to testify, all grounds for such claim and privilege now being removed.

JAMES W. BLAINE
VERNON K. SMITH
Attorneys for Petitioner
Residence: Boise, Idaho

STATE OF IDAHO
COUNTY OF ADA } ss.

JAMES W. BLAINE, Being first duly sworn on oath, deposes and says:

That your affiant was the attorney of record for the above named defendant in both the trial court and upon the appeal of this case; that immediately upon the release of Donald Lee Fedder from the Teton County jail your affiant interrogated the said Donald Lee Fedder as to the facts of the above entitled case, a true and correct copy of the notes of said interrogation being attached hereto, marked Exhibit "A" and made a part hereof by reference.

That upon the trial of the case your affiant was aware of the fact that the plaintiff intended to call the said Donald Lee Fedder as a witness in its behalf and was aware of the testimony the said Donald Lee Fedder had given in the previous case of The State of Idaho vs. Donald Lee Fedder; that your affiant expected the said Donald Lee Fedder to testify to the same effect as he did in his own defense in the previous case, in which event your affiant was prepared to impeach such testimony, or to testify in accordance with the statement given your affiant; that in either event the defendant would be absolved of participation in the crime charged as the statement of the said Donald Lee Fedder is in accordance with the evidence of this case as the record shows.

JAMES W. BLAINE

Subscribed and sworn to before me this 19th day of July, 1955.

JOHN A. CARVER, JR.
Notary Public for Idaho
Residing at Boise, Idaho

(SEAL)

EXHIBIT "A"

DONALD LEE FEDDER

Left Boise around 4 P.M. Sunday. Went to Idaho Falls. Met a guy in Idaho Falls at corner of Park Avenue & A St. Originally planned to see man who leases Grand Hotel about machines but didn't see him. The guy they met called George, doesn't know last name but has seen him around the bars in Idaho Falls. About 38 years, 5'10", Brown hair, 185 lbs. Brown pants, brown shirt, light jacket, cap.

George said a partner in Tetonia Club at Tetonia wanted him to get machines which he would sell for $40.00 apiece. Fedder said for George to go ahead of them and they would eat at Rigby and meet him in front of the K Cafe in Driggs.

Got to Driggs around 11:30 or 12:00. Met George, he had a grey Pontiac or Chev. 1947-48, 4 door.

George had 2 machines in car. Put them in station wagon. George said he didn't want Floyd to go. Floyd said he would go see some relative. Told Floyd where he was going and that one partner was going to rob other partner and Fedder going to buy machines.

2 machines Jennings club chief light up which George said they could sell those in St. Anthony. Place closed when they got there. George said he could get him on the phone.

George had stolen license plates in his car. Said the one partner didn't want the other partner to know what car.

George said partner would leave door unlocked but would not take them off stands. George brought a crow bar.

Got to Tetonia 3:30 or 4:00 a.m. Parked at some tourist cabin across the street. Went to club door unlocked. Fedder stood in doorway. Light on in place. George gave Fedder one machine George took another which they loaded. Got 2 more. Didn't see anyone.

Fedder drove up. George back. Put plates on in Driggs.

Saw a red light near Driggs. Fedder said a wreck. Saw two guys run across the road. George put on brake.

Shot tires. George ask him if he could get out. Fedder said no thought his leg was broke.

Car went off on right hand side.

George went around front of car and Fedder told him to take off.

Car traveled ½ block from road block.

IN THE SUPREME COURT OF THE
STATE OF IDAHO

No. 8202

AFFIDAVIT

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

FLOYD JOHNSON,

Defendant-Appellant.

STATE OF IDAHO
COUNTY OF ADA } ss.

FLOYD JOHNSON, being first duly sworn upon oath deposes and says:

I am the defendant and appellant in the above entitled action and I make this affidavit in support of my petition for rehearing.

I further state that I was not present, nor was I in the company of Donald Lee Fedder when the said Donald Lee Fedder allegedly entered the Tetonia Club in Tetonia, Teton County, Idaho, on the 29th day of December, 1952.

I further state that prior to the trial of the said Donald Lee Fedder, a disagreement arose between us concerning a financial transaction, as a result of which our relations became strained.

I further state that following the rendition of the decision of this Honorable Court, wherein my conviction was affirmed, I sought out the said Donald Lee Fedder and appealed to him to make a true statement under oath concerning the facts as to whether or not I was involved in the alleged burglary of said Tetonia Club on the 29th day of December, 1952, and that the attached affidavit was made by the said Donald Lee Fedder in Reno, Nevada where I finally located him and that I offered him no remuneration, promise or anything whatsoever except that I appealed to his sense of fairness despite our former disagreement.

I further state that the said Donald Lee Fedder who executed the attached affidavit is one and the same person who was charged in Teton County upon the charge of burglary of the Tetonia Club in Tetonia, which allegedly occurred on the 29th day of December, 1952, and is one and the same person as the said Donald Lee Fedder who was called as a witness at my trial in Bingham County, State of Idaho, and who refused to testify, claiming his constitutional privilege at pages 170-171 and pages 190-191 of my transcript on appeal.

FLOYD JOHNSON

Subscribed and sworn to before me this 19th day of July, 1955.

JAMES W. BLAINE
Notary Public for Idaho
Residence: Boise, Idaho

(S E A L)

STATE OF
COUNTY OF } ss

DONALD LEE FEDDER, being first duly sworn, deposes and says:

On the 28th day of December, 1952, FLOYD JOHNSON and I left Boise around 4 p.m. to meet a party in Idaho Falls about buying some slot machines. We arrived in Idaho Falls about 9 p.m. and met a party known only to me as George, at the corner of Park Avenue and A Street.

George informed me he had slot machines for forty dollars ($40.00) a piece at the club in Tetonia and the owner wanted them picked up that night. George also stated he didn't want Johnson along during the purchase, so Johnson suggested he could stay at a relative's place in Driggs and would pay for them on delivery. It was suggested that George go on and we would follow after eating our supper.

We arrived in Driggs around 11:30 p.m. George was sitting in his car at the front of the K Cafe and we signaled him to follow as we started back towards Tetonia.

Johnson stopped the car near the edge of town and said a certain house was probably his relative's and he would see us when we returned.

George and I proceeded to drive the two cars towards Tetonia and about a half mile out of Driggs George blinked his lights to stop and said he had two Jennings slots to transfer into Johnson's car. Arriving at Tetonia about 12:30 we decided the Tetonia Club was still in operation so would have to come back later.

George suggested he knew a club operator in St. Anthony that would buy the two Jennings slot machines and we wouldn't have to haul them home.

We proceeded to St. Anthony and arrived there at approximately 1:15 a.m. We were unable to locate the club operator and by this time decided it was time to go back to Tetonia. George parked his car on a side street in St. Anthony and we both rode back to Tetonia in Johnson's car arriving at approximately 4:30 a.m., December 29th.

The door to the Tetonia Club was unlocked, as George said it would be if the bartender wasn't there. After loading the machines, George suggested letting him drive back to Driggs.

We were nearing Driggs at a moderate rate of speed around 40 miles per hour and saw lights ahead which looked like a probable wreck, but was indistinct because of a heavy snowfall.

It was at this time we heard a shotgun blast and George yelled the car was out of control. There was a

terrific impact and I slightly remember George trying to get me out of the car but was unable to move because of injuries and being pinned in.

It was perhaps two minutes later I heard shouted orders to come out with my hands up to which I replied I could not.

I say that from the time we left Driggs till we got back Floyd Johnson charged with burglary of the Tetonia Club located at Tetonia, Teton County, Idaho, December 29, 1952, did not at said time and place commit the crime of larceny, or any other crime upon the premises hereinabove mentioned.

Dated this 18th day of July, 1955.

DONALD LEE FEDDER
Donald Lee Fedder

Subscribed and Sworn to before me this 18th day of July, 1955.

LENARD D. ROBISON
Notary Public in and for said County and State, residing at 138 N. Sierra St., Reno, Nev. My commission expires July 14, 1958.

(S E A L)

September 16, 1955

STATE OF IDAHO, *Plaintiff-Respondent,* v. FLOYD JOHNSON, *Defendant-Appellant.*	}	No. 8202

Justice Smith announced the decision in this cause on June 29, 1955, to the effect that the judgment of the District Court of the Ninth Judicial District of the State of Idaho, for Teton County, is affirmed.

IT IS NOW THEREFORE SO ORDERED.

SUPREME COURT OF THE UNITED STATES

No. . . . . , October Term, 1955.

FLOYD JOHNSON,
Petitioner,

VS.

STATE OF IDAHO

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner (s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 11, 1956.

(SGD) WM. O. DOUGLAS
Associate Justice of the Supreme Court of the United States.

Dated this 14th day of December, 1955.

No. 677

FILED
MAR 8 1956
HAROLD B. WILLEY, C

In the Supreme Court of the United States

FLOYD JOHNSON,
Petitioner,

vs.

STATE OF IDAHO,
Respondent.

Brief In Opposition to Petition for Certiorari

GRAYDON W. SMITH
Attorney General
State of Idaho

J. R. SMEAD
Assistant Attorney General
State of Idaho

HAROLD S. FORNUSH
Prosecuting Attorney
Teton County, Idaho
Attorneys for Respondent

SYMS-YORK COMPANY, BOISE, IDAHO

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Counselman v. Hitchcock, 142 U.S. 547, 12 Sp. Ct. 195, 35 L.Ed. 1110.

Cullen v. Comm. 24 Grat. 624 (Va.).

Emery v. State (Wis.), 78 N.W. 145.

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Raffel v. United States, 291 U.S. 494, 46 Sp. Ct. 566, 70 L. Ed. 1054.

Railroad Co. v. Lybrend, 27 S.E. 794.

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State v. Hargraves, 62 Idaho 8, 17-19.

State v. Johnson, 287 Pac. 2d. 425.

State v. Martinez, 43 Idaho 180, 195-196.

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Jones, Evidence, Second Edition, Vol. 6, Secs. 2474, 2475, 2483, 2490, 249[illegible]

70 C.J. 727, Sec. 880.

58 Am. Jur. 72, Sec. 84.

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U. S. Constitution, Fifth Amendment.

U. S. Constitution, Fourteenth Amendment.

In the Supreme Court of the United States

FLOYD JOHNSON,
Petitioner,

vs.

STATE OF IDAHO,
Respondent.

Respondent's Brief

We will endeavor to make this document brief in fact as well as in name.

Without going into the contents of the decisions of our courts we content ourselves by saying that it is a well and long established rule of procedure that in a criminal appeal, the appellant has the burden of proof. He must show by and from the record below, to the satisfaction of the appellate tribunal, that the error asserted by him was in fact committed by the lower court. The petitioner in this Court has attempted in his Petition to limit the record properly to be examined to a few questions and answers when Donald Lee Fedder was called to the witness stand by the prosecution and by this petitioning defendant, respectively. On this

fragment of the real record the petitioner's argument is premised.

However, perusal of the decisions, or for that matter any one of them, makes it very plain that a trial judge shall consider and hold in mind the entire factual situation as it existed at the time the questions were asked and the constitutional privilege against self-incrimination was asserted. The whole record of the trial proceedings in this matter is on file in this Court (Tr., State v. Johnson, Supreme Court of Idaho) and assuredly should be read and considered in determining whether to grant or deny this petition. When this is done, it will readily appear that the Idaho Supreme Court, in its decision, held in mind and correctly summarized the evidence which was before the trial court when Fedder asserted the privilege (287 Pac. 2d 425, and see Petition, pp. 36-55). From that decision also appears that Fedder himself had already been tried for his participation in the burglary, committed in Tetonia, had come there from Driggs and had attempted to return there, had been captured and convicted, and had appealed to the State Supreme Court. His appeal was pending when the attempt to compel him to testify occurred, and was ascertained by the trial judge before deciding the question of privilege.

Futhermore, the decision in his case, to which petitioner has not called this Court's attention, came down a little later and is found in 76 Idaho 535, 285 P. 2d 802. It is very enlightening. The testimony of Fedder in that case is summarized at some length, among other

things the fact that he had testified that he together with this petitioner, Floyd Johnson, committed the burglary. Indeed, the only defense was a denial of criminal intent when they entered the building. When it is remembered that when Fedder was called to the stand in Johnson's trial he was still defendant in his own case and as such was seeking a new trial from the Idaho appellate court, this matter now before this Court rests on a very different basis than in any or all of the few cases cited by petitioner. Had Fedder been successful in obtaining a new trial, there would have been, factually, a trial de novo of the charge against him. When he was asked the questions quoted by petitioner, they presented most assuredly a threat to incriminate him *whatever answer he might give.* If he answered yes either to the prosecution's question or the defense question, he would certainly establish a very indispensable link in the chain of evidence of burglary by himself. If he answered no, he certainly would invite prosecution for perjury.

Moreover, if, after giving an affirmative answer to the effect that he was in Tetonia the night of December, 29, 1952, no other question had been asked him, he would have been subject to cross-examination by defense counsel.

Idaho Code, Secs. 19-1205, 19-2110;
Barton v. Dyer, 38 Idaho 1, 7;
State v. Martinez, 43 Idaho 180, 195-196;
Towne v. N. W. Life Ins. Co., 58 Idaho 83, 90-92;

State v. Hargraves, 62 Idaho 8, 17-19;
State v. Mundell, 66 Idaho 297, 306-310;

and see

Raffel v. United States, 271 U. S. 494, 46 Sp. Ct. 566, 70 L. Ed. 1054

specially applicable here.

For instance, what time of night were you there? Were you in any place of business in Tetonia? Did anyone go to Tetonia with you? If so, who? Did anyone go with you into such place of business? What did you do in Tetonia that night? What did the other person who was with you do? And so on. There is considerable latitude given cross-examination for different purposes, among them, to test the witness's memory, to test his credibility, and to show, or lay the ground for showing, that he testified falsely on direct.

Had his answer been no, the door to the same field of cross-examination would have been thrown open with the same results, *and* his former testimony in his own behalf would have been a fertile source from which might well develop a prosecution for perjury.

It should also be noted that these two men were charged as joint operators in the commission of the same burglary, and for that very reason, so far as this petitioner's attempt to make Fedder his witness is concerned, he could not, because of the constitutional provision, compel Fedder to testify as a defense witness.

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This is the rule whether two such be tried jointly or each be tried separately.

State v. Fox, 52 Idaho 474, 484, 16 Pac. 2d, 663.

After the Idaho Supreme Court had affirmed Johnson's conviction, his attorneys petitioned for a rehearing and attached to that Petition some Affidavits obtained after the conviction of Fedder had been affirmed, thus attempting to retry Johnson's case in the State court of last resort and so doing falsify Fedder's testimony given at his own trial. That court very properly paid no attention to those exhibits, doubtless for the very good reason that such an unauthorized filing, or even certification, of such papers does not make them a part of the record.

State v. Trathen, 51 Idaho 435, 6 P. 2d 150.

But in this proceeding the document which purported to state the substance of what Fedder said even before his own trial surely now discloses, if it were assumed to be a truthful record, another very good reason why Fedder asserted his constitutional privilege at this petitioner's trial and an excellent reason why the trial judge should not have undertaken compelling him to answer in spite of the Constitution.

To determine what the trial judge had before him for consideration it is necessary to read the whole testimony which preceded Fedder's questioning. When this is done, that record discloses a situation in which, what-

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ever answer he had in mind, the two question asked Fedder concerning his presence in Tetonia and in Driggs presented a threat of incrimination about as real as can be. (See Tr. Idaho Supreme Court, pp. 1 -190) When one puts himself in the same time and place as was the presiding trial judge and then considers the record of testimony which preceded Fedder's questioning plus the fact that his own case was by no means completed and might well be tried de novo, there is nothing in any of the cases cited by the petitioner which conflicts with the trial court's ruling. The rule stated in the *Burr* case authorizes the claim of privilege if *any* answer to a question might be incriminating, and moreover requires that in such a situation the presiding judge must sustain the witness's claim. The witness is by no means obliged to state why or how his answer would incriminate. If this were necessary, the constitutional provision would be an empty gesture. That rule, or test, has been repeatedly quoted and followed by the courts of this nation. If, as stated in the Petition, adversary counsel have not found any cases holding against their present contention, it would seem that they have not traveled far in the field of research or, if they did, they overlooked the trail markers.

Of the cases cited in the Petition, the *Mason* decision of this Court at an earlier day dealt with a state of facts which disclosed nothing to threaten crimination if the witness answered the questions asked, for the very good reason that there was no criminal law applicable in that jurisdiction, which is certainly far apart from the facts in the present case.

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In the *Bond* case from Idaho, the woman witness was also charged as particeps criminis, but the question now presented did not arise in that case at all. She testified willingly on direct and it was not until certain questions were asked her on cross-examination that any objection was interposed. It is very evident that she became a willing witness in order to shift the blame on Bond as far as possible. Had she, as did Fedder, refused to testify at all she would, we submit, have been well within her constitutional rights.

In the *Brown* case from this Court, the Court did not know what the documents would have shown concerning Brown's criminality and not knowing, presumed in line with unbroken authority to that effect that the trial judge had in some way ascertained their contents and found that they did not tend to incriminate Brown. That case is certainly of little assistance here, pro or con, because the record from the state court, on file herein, shows the whole factual condition that existed when the questions were put to Fedder.

In *Ex parte Irvine* the late Justice Taft, then Circuit Judge, wrote at length concerning the leading decisions then extant including the Burr decision and concluded that the facts of record in the case under consideration afforded reasonable grounds for concluding that the witnesses could have incriminated themselves and probably would have established an offense, for which reason their claim of privilege should have been upheld. That case in itself, we submit, should be enough to cause a denial of the Petition for Certiorari herein.

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In the *Stewart* case from Washington, the witness when called to the stand was under a charge of some kind, but before her refusal to testify, that charge against her was dismissed. The Washington Supreme Court did not know what she had been charged with or even of what the defendant at whose trial she refused to testify was accused, and did not even know whether the witness was charged with a crime or not. That was another case where the appellant certainly fell short of furnishing the appellate court with a record of facts which would support appellant's assertion of error.

In the California case of *Coleman* v. *Galvin*, the appellate court did not believe that Galvin ever intended to assert the constitutional privilege nor to be understood as saying that if he answered he would incriminate himself. That record disclosed the rather obvious fact that his answers if given would in no way have connected him with the crime of fraudulent concealment of property, hence the decision. Important here, the Court did cite with approval two earlier California decisions, *In re Berman*, 287 *Pac.* 125 and *Ex parte Clark*, 37 *Pac.* 230. When those decisions are consulted, it is found they are very much in point as supporting this respondent's position herein, with the result that this Petition should be denied.

The *Jennings* case from Oregon was decided under a constitutional provision and a statute, the constitutional provision very different from that of Idaho and the statute being also different from those of Idaho. The citation of the case by this petitioner is welcomed

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by this respondent, because in point of fact it is so different. When compared with the facts of record in this case they are about as far apart as two cases can be. Those involved in the Oregon case were not accused of anything nor was anyone else who had been inside the building when it was attacked, and all the record evidence against those of the attackers who had been tried showed no possible ground upon which to base any charge against the "recalcitrant" witnesses.

On the other hand, there are numerous decisions supporting respondent's position in this matter. We have cited a number in the index hereof. Referring again to the *Berman* case, it was there held, among other things, that if the answer "no" endangers a witness of prosecution for perjury, he need not answer; that it must be "perfectly clear" that an answer *could* not incriminate him.

The *Clark* case was based on *Counselman* v. *Hitchcock* from this Court. The Wyoming case of *Miskimins* v. *Shaver*, 58 *Pac.* 411, is a complete review and discussion of the then existing applicable decisions, both state and federal, and has been frequently cited. We will not here impose on those who will consider this petition by a lengthy attempt at summarizing the decision. It speaks for itself and so do the authorities therein cited and quoted. The other cited authorities do likewise.

In conclusion, we submit as properly and conclusively applicable here, that when it appears to the trial judge that any answer to a question, whatever the answer might be—in other words, if any one of

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several different permissable answers might tend to incriminate, to establish a link in a chain of evidence that could be used to convict the witness, then the witness is the sole judge of whether or not the constitutional privilege may be properly claimed. We think it very plain in the instant matter that Fedder was the sole judge under the law and that his claim of privilege was properly asserted and properly upheld by the trial judge, and respectfully so submit.

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